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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI, TEXAS BANKING COMMISSIONER,
Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Case Nos. 96-50847 and 96-10818

PETITIONER'S APPENDIX VOLUME IV

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA HAMILTON
Deputy Attorney General

DAVID MATTAX
Assistant Attorney General

D'ANN JOHNSON
Counsel of Record
Special Assistant Attorney General
2601 North Lamar Boulevard
Austin, Texas 78705-4294
(512) 475-1327

STEVEN A. FLECKMAN
JULIA B. KENNER
Fleckman & McGlynn
1800 NationsBank Tower
Congress Avenue
Austin, Texas 78701

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3841) to amend the Bank Holding Company Act of 1956, the Revised Statutes of the United States, and the Federal Deposit Insurance Act to provide for interstate banking and branching, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

SUMMARY OF MAJOR PROVISIONS

Title I -- Interstate Banking and Branching

Interstate Banking

The legislation permits bank holding companies to acquire banks in any State one year after enactment of the legislation. State laws which require the acquiring company to acquire a bank that has been in existence for a specified minimum period of time (not to exceed five years) are preserved. Any State law which requires a bank to be acquired to be in existence for more than five years applies as if it requires that the bank being acquired be five years old.

Section 3(d)(1)(D) of the Bank Holding Company Act, as amended by section 101, protects the applicability of a State law that makes the acquisition of a bank contingent upon a requirement that a portion of the bank's assets be available to a

State-sponsored housing entity established under State law, under the conditions that the State law is not discriminatory, that the State law was in effect as of the date of enactment of this Act, and that compliance with the State law would not result in an unacceptable risk to the deposit insurance fund and would not place the bank in an unsafe or unsound condition.

The Federal Reserve Board may not approve an interstate acquisition if, as a result of the acquisition, the bank holding company would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States or 30 percent or more of the deposits in the home State of the bank to be acquired. Notwithstanding the 30 percent limit, the Board could approve such a transaction if the home State waives the 30 percent limit either by statute, regulation, or order of the appropriate State official based on standards that do not have the effect of discriminating against out-of-State institutions.

The above concentration limits do not apply to initial entry into a State by a bank holding company. If, however, a State has a deposit concentration cap which applies in a non-discriminatory manner to both in-State and out-of-State bank holding companies making initial entry acquisitions, then nothing in the legislation affects the State's authority to impose such deposit cap.

Community Reinvestment Laws

The Board shall continue to comply with its responsibilities under the Community Reinvestment Act of 1977, with respect to applications under section 3(d) of the Bank Holding Company Act of 1956. Currently the Board reviews applications under section 3(d) in accordance with existing

regulations (such as Regulations Y and BB) and practices, and the conferees intend that nothing in this bill will alter or affect such regulations and practices as established by the Board.

In acting on an application under section 3(d), the Board shall also consider the applicant's record of compliance with applicable State community reinvestment laws.

Applicability of Antitrust Laws

The title provides that no provision of the antitrust laws is to be construed as being affected by the interstate banking amendments to the Bank Holding Company Act, including the act's provisions on concentration limits. The applicability, if any, of State antitrust laws is likewise preserved. Nothing in this provision is intended to affect or expand the existing applicability of State antitrust laws, under current statutory or case law, to interstate acquisitions.

STATE TAXATION AUTHORITY

Section 101(l) amends the Bank Holding Company Act of 1956 to provide that nothing in that Act shall be construed as affecting the authority of any State or political subdivision to adopt, apply or administer any tax or method of taxation to any bank, bank holding company or foreign bank, or their affiliates, to the extent that such tax or tax method is otherwise permissible under the Constitution or other Federal law. This is intended to clarify that it is not the Conferees' intent to overturn existing State tax law pertaining to distinct legal entities within a corporate structure. The provision recognizes the existence of corporate affiliates and reaffirms that States may segregate the separately incorporated entities within a bank or bank holding company for State taxation purposes, to the extent permissible

under the Constitution or other Federal law.

"Similar amendments are made to section 44 of the Federal Deposit Insurance Act and to Title I.

AFFILIATED BANKS AS AGENTS

The Conferees accepted a modified version of a provision in the House bill permitting certain affiliated depository institutions to act as agents for each other for purposes of receiving deposits, renewing time deposits, closing loans, servicing loans and receiving payments on loans and other obligations for other affiliated depository institutions, with several amendments.

The modified provision permits bank subsidiaries, rather than depository institution subsidiaries, of bank holding companies to act as agents for depository institution affiliates. Subject to certain conditions, insured savings associations which were affiliated with banks as of July 1, 1994, may act as agents for such banks under this provision.

As used in this provision, the term "receive deposits" means the taking of deposits to be credited to an existing account and is not meant to include the opening or origination of new deposit accounts at an affiliated institution by the agent institution.

The Conferees deleted the authority in the House bill for affiliated depository institutions to disburse the proceeds of loans for other affiliated depository institutions and substituted authority to service loans. The Conferees intend that, under this authority to service loans, agent banks may perform ministerial functions for the principal bank making a loan. Those ministerial functions include such activities as providing loan applications, assembling documents, providing a location for

returning documents necessary for making the loan, providing loan account information (such as outstanding loan balances), and receiving payments. It does not include such loan functions as evaluating applications or disbursing loan funds. The term "close loans" does not include the making of a decision to extend credit or the extension of credit.

The Conferees also intend that the provision permit affiliated banks to act as agents for one another regardless of whether the institutions are located in the same or different [s]tates.

Under section 18(r)(3) of the Federal Deposit Insurance Act (as added by section 101(d) of this title), a bank may not conduct any activity as an agent that such bank is prohibited from conducting as principal under applicable Federal or State law. Prohibited activities under this provision include activities by a bank acting as agent that would be prohibited to the bank acting as principal under the applicable consumer protection, powers and other laws of the State where the bank is situated. The Conferees intend that the limitation on acting as agent under section 18(r)(3) shall also be applied to all United States offices of foreign banks covered under the definition of bank in the Act, when acting as agent for a depository institution affiliate. Agency relationships may be used to promote operational efficiencies, but they may not be used to evade applicable consumer protection, powers, and other laws of the Sate where the agent institution is situated.

The Conferees also intend to clarify, through the addition of a savings clause, that this section does not affect the authority of a depository institution to be an agent for a depository institution under any other provision of law, nor does it affect a determination under any other provision of law

whether the agent should be considered to be a branch of the depository institution. The Conferees do not intend that new subsection 18(r) of the Federal Deposit Insurance Act affect the application of other provisions of law which permit agency relationships between affiliated depository institutions. The Conferees note that subsection 18(r) applies narrowly only to affiliated depository institutions acting as agents, and has no application to agency relationships concerning non-depositories as agent, whether or not affiliated with the depository institution.

Section 18(r) shall not be construed as authorizing transactions which result in the transfer of any insured depository institution's Federal deposit insurance from one Federal deposit insurance fund to the other Federal deposit insurance fund.

INTERSTATE BRANCHING

Introduction

The Conferees decided on an interstate branching structure somewhat different than the structure of either the House or the Senate bills. Under the House structure, branching (other than the establishment of de novo branches) was permitted three years after enactment through a one-step acquisition of an existing bank and its conversion to branches of the acquiring bank, under the National Bank Act for national banks or the Federal Deposit Insurance Act for State banks. The Senate structure used a two-step process effective June 1, 1997, with the interstate acquisition of a bank under the Bank Holding Company Act of 1956 subsequently followed by a consolidation of the newly acquired bank with another bank owned by the holding company.

The Conferees adopted a structure under which a bank would engage in a merger transaction with the out-of-State bank and convert any of its offices into branches of the resulting bank under the authority of a new section of the Federal Deposit Insurance Act. Such a transaction would be subject to approval under the Bank Merger Act.

The House bill authorized bank holding companies to consolidate affiliated banks into a single bank with interstate branches 18 months after enactment of the legislation. The Senate bill did not provide for early consolidation. The House receded to the Senate, thereby permitting consolidation of affiliated banks in different States through an interstate merger transaction when interstate branching takes effect on June 1, 1997.

Once a bank has established branches in a host State through an interstate merger transaction, such bank may establish and acquire additional branches at any location in the host State where any bank involved in the interstate merger transaction could have established or acquired branches under applicable Federal or State law.

Interstate Branching Through Mergers

Beginning June 1, 1997, a bank may merge with a bank in another State so long as both States have not opted out of interstate branching between the date of enactment and May 31, 1997. States may enact laws opting-out of interstate branching before June 1, 1997, subject to certain conditions. States may also enact laws permitting interstate merger transactions before June 1, 1997. Host States may impose conditions on a branch resulting from an interstate merger transaction that occurs before June 1, 1997, if the conditions do not discriminate against out-

of-State banks, are not preempted by Federal law, and do not apply or require performance after May 31, 1997.

State laws requiring out-of-State banks or bank holding companies to merge with, or acquire a bank that has been in existence for a specified minimum period of time (not to exceed five years) are preserved with respect to interstate merger transactions. Any such State law which imposes a minimum age requirement of more than five years on a bank to be acquired is to be applied as if the minimum age requirement is five years.

Any bank that files an application for an interstate merger transaction shall comply with any filing requirement of any host State of the bank resulting from the transaction, to the extent the requirement does not discriminate against out-of-State banks or bank holding companies, and is similar to any requirement imposed on non-banking corporations incorporated in another State that engage in business in the host State. Banks must also file a copy of the application for the interstate merger transaction with the State bank supervisor of the host State. The responsible agency may not approve an application if the applicant materially fails to comply with the host State's filing requirements.

The responsible agency may not approve an application for an interstate merger if the resulting bank would control more than 10 percent or more of the total amount of deposits of insured depository institutions in the United States or 30 percent or more of the deposits in any State affected by the interstate merger. Notwithstanding the 30 percent limit, the responsible agency could approve a transaction if the home State waives the 30 percent limit either by statute, regulation, or order of the appropriate State official based on standards that do not have the effect of discriminating against out-of-State institutions.

The concentration limits do not apply with respect to any interstate merger transactions involving affiliated banks. The concentration limits also do not apply to initial entry into a State by a bank or its affiliates. If, however, a State has a deposit concentration cap which applies in a non-discriminatory manner to both in-State and out-of-State banks and bank holding companies, then nothing in the legislation affects the State's authority also to impose such deposit caps to initial entries.

The responsible agency may approve an application for a merger only if each bank involved in the transaction is adequately capitalized as of the date the application is filed, and the agency determines that the resulting bank will continue to be adequately capitalized and adequately managed.

The laws of the host State regarding community reinvestment, consumer protection (including applicable usury ceilings), fair lending, and establishment of intrastate branches shall apply to any branch of a national bank in the host State to the same extent as such State laws apply to a branch of a bank chartered by that State, except when Federal law preempts, or when the Comptroller determines that the law has a discriminatory effect on the branch in comparison to branches of State-chartered banks. Such laws shall be enforced by the Comptroller of the Currency.

Acquisition of Branches

New Section 44(a)(4)(A) of the Federal Deposit Insurance Act (as added by section 102(a)) permits the responsible Federal regulator to approve the acquisition of a branch of an insured bank without the acquisition of the entire bank only if the law of the State in which the branch is located permits out-of-State banks to acquire a branch of a bank without

acquiring the bank. The Conferees intend that, in approving such acquisitions, Federal regulators will ensure that State minimum age restrictions under paragraph (5) which apply to such acquisitions are preserved. Federal banking agencies should not approve the acquisition of a branch (if permitted under paragraph (4)) in host States which have minimum age laws regarding the acquisition of banks, unless such laws expressly permit branches in the host State to be acquired without the acquisition of the bank.

Applicability of Community Reinvestment Laws

Under current law, most interstate movement by banking organizations takes place via the Bank Holding Company Act. Current regulations and practices of the Board of Governors of Federal Reserve System delineate the scope of CRA performance considered by the Board in acting on applications by a bank holding company to move interstate via section 3(d) of the Bank Holding Company Act.

Section 44(b)(3) of the Federal Deposit Insurance Act (as added by section 102(a) of this title) provides that, only with respect to initial entry into a host State by a bank without branches or a bank affiliate in that host State, the scope of CRA performance considered by the responsible Federal banking agency in connection with an interstate branching application will parallel the scope of CRA performance which would be considered by the Board of Governors of the Federal Reserve System (to the same extent as outlined in the statement of managers accompanying section 3(d)(3) of the Bank Holding Company Act of 1956, as amended by section 101(a) of this title) if the application were for an interstate bank holding company acquisition pursuant to section 3(d) of the Bank

Holding Company Act. Hence, in those cases of initial entry, the Conferees intend that the responsible federal banking agency comply with its responsibilities under section 804 of CRA consistent with current regulations and practices with respect to bank mergers and also to take into account the CRA record, including the most recent written evaluation, of any affiliate banks of the resulting bank.

With respect to all other interstate branching applications apart from those involving initial entry into a host State, the responsible Federal banking agency shall carry out its responsibilities under section 804 of the Community Reinvestment Act consistent with its current regulations and practices with respect to bank mergers.

In all cases, when taking into account the CRA performance of an institution with branches in more than one State in connection with acting on an interstate branching application, the Conferees expect that the responsible Federal banking agency will take into account the institution's performance under CRA in each State in which it maintains branches.

In addition, when acting on an interstate branching application, the responsible Federal banking agency shall take into account the records of compliance with applicable State community reinvestment laws of any applicant bank.

Applicable State Law

States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and

communities. Federal banking agencies, through their opinion letters and interpretive rules on preemption issues, play an important role in maintaining the balance of Federal and State law under the dual banking system. Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.

Accordingly, the title emphasizes that a host State's laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches will apply to interstate branches of national banks established in the host State to the same extent as those laws apply to a branch of a State bank, except when Federal law preempts application of the State laws to a national bank, or when the Comptroller of the Currency determines that the State laws have a discriminatory effect on the branch as compared with their effect on a branch of a State bank.

Under well-established judicial principles, national banks are subject to State law in many significant respects. The laws of the State in which a national bank is situated will apply to the national bank unless those State laws are preempted by Federal law. Generally, State law applies to national banks unless the State law is in direct conflict with the Federal law, Federal law is so comprehensive as to evidence Congressional intent to occupy a given field, or the State law stands as an obstacle to the accomplishment of the full purposes and objectives of the Federal law. In this regard, the impact of a State law on the safe and sound operations of a national bank is one factor that may be taken into account in considering whether Federal law preempts State law. Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law

where possible. The title does not change these judicially established principles.

During the course of consideration of the title, the Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive, resulting in preemption of State law in situations where the Federal interest did not warrant that result. One illustration is OCC Interpretive Letter No. 572, dated January 15, 1992, from the OCC to Robert M. Jaworski, Assistant Commissioner, State of New Jersey Department of Banking, concluding that national banks in New Jersey are not required to comply with the New Jersey Consumer Checking Account Act. It is of utmost concert to the Conferees that the agencies issue opinion letters and interpretive rules concluding that Federal law preempts State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches only when the agency has determined that the Federal policy interest in preemption is clear. In the case of Interpretive Letter No. 572, it is the sense of the Conferees that the fact the Congress has acknowledged the benefits of more widespread use of lifeline accounts through the enactment of the Bank Enterprise Act did not indicate that Congress intended to override State basic banking laws, or occupy the area of basic banking services to such an extent as to displace State laws, or that the existence of State basic banking laws frustrated the purpose of Congress.

The Conferees have similar concerns regarding the scope of the OCC interpretive rule that appears at 12 C.F.R. § 7.8000, which broadly asserts that Federal law governing the deposit-taking functions of national banks preempts any State law that

attempts to prohibit, limit, or restrict deposit account service charges. In light of the Conferees' views regarding the proper application of recognized preemption standards discussed above, the Conferees urge the OCC to review Interpretive Ruling 7.8000 to determine if it should be withdrawn or revised.

The Conferees understand that in certain cases some states have imposed conditions on, or obtained commitments from, bank holding companies in connection with a company's acquisition of banks outside its home State. The title provides that such conditions or commitments existing as of the date of enactment of the Interstate Banking and Branching Efficiency Act of 1994 will continue to be enforceable against the bank holding company or an affiliated successor company to the same extent as they were previously if a bank holding company with bank subsidiaries in more than one State chooses to combine its banks under new section 44 of the Federal Deposit Insurance Act (as added by section 102(a) of this title). The title does not create any new State enforcement authority with respect to any conditions imposed or commitments made before the enactment of the title.

Interpretations Concerning Federal Preemption of State Law

In view of the Congressional concern regarding preemption of State law regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, the Conferees concluded that a more open process for reaching preemption conclusions in these areas, with a clearly structured, meaningful opportunity for interested parties to communicate their views to the agency, was warranted. Also, it is important that the agencies make their determinations on Federal preemption of State law available to the public in a

timely and accessible manner. Accordingly, the title imposes certain procedural requirements on agency preemption opinion letters and interpretive rules in connection with State laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, whether or not related to interstate branching. The Conferees believe that the public notice and openness provided by the new process will be a vital safeguard to ensure that an agency applies the recognized principles of preemption, discussed above, in a balanced fashion.

The title provides that before issuing any opinion letter or interpretive ruling concluding that Federal law preempts State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches, the appropriate Federal banking agency will publish notice in the Federal Register of the request, or of the agency's intention on its own motion, to determine whether Federal law preempts a particular State law. The notice should describe each State law in question and otherwise provide information sufficient to enable interested parties to comment meaningfully on the issue under consideration. The agency also should promptly make available upon request a copy of any incoming request letter. The title also requires the agency to publish in the Federal Register a copy of the final opinion letter or interpretive rule.

The Federal Register publication requirement is intended to provide readily available and widespread notice to interested parties of the opportunity to comment on preemption matters that have not been previously resolved by the agency or courts. The title requires the agency to give interested parties not less than 30 days in which to submit comments. In establishing the length of the comment period, the Conferees intend that the agencies should take into account the complexity of the preemption issue

involved and the number of parties likely interested in responding to the solicitation of public comment and the resources of those parties. The Conferees also expect the agencies to be flexible in extending the comment period if requested to do so by an interested party for good cause shown. The title further requires the agency to take the public comments into account in reaching its decision, even though each particular comment need not be specifically discussed in the final product.

This process is not intended to confer upon the agency any new authority to preempt or to determine preemptive Congressional intent in the four areas described, or to change the substantive theories of preemption as set forth in existing law. Rather, it is intended to help focus any administrative preemption analysis and to help ensure that an agency only makes a preemption determination when the legal basis is compelling and the Federal policy interest is clear.

The public notice and comment process is not required when a particular request raises issues of Federal preemption of State law that are essentially identical to those previously resolved by the agency or the courts, or when the incoming request regarding preemption contains no significant legal basis upon which to make a preemption determination. The title also exempts materials prepared for use in judicial proceedings, for submission to Congress or a member of Congress, and for intra-governmental use from the new public notice requirements. The intra-governmental use exception, in particular, is intended to carve out an exception for materials provided to or from, or shared with, agency personnel or other agencies in the Executive Branch. Examples of the type of such material include, but are not limited to, memoranda, letters, correspondence, advisory opinions, or other materials that are part of the deliberative

process that governs the making of decisions and policies within the Executive Branch. An exception to the notice and comment provisions is also provided in cases when the appropriate Federal banking agency determines in writing that the exception is necessary to avoid a serious and imminent threat to the safety and soundness of a national bank.

The Comptroller must follow the notice and comment process in making any determination under section 5155(f)(1)(A)(ii) of the Revised Statutes that State laws discriminate against a branch of a national bank as compared with a branch of a State bank.

The Conferees expect that the Federal banking agencies will be receptive to well-supported requests from interested parties seeking reconsideration of previous interpretive rules or opinions regarding State community reinvestment, consumer protection, fair lending and intrastate branching laws, consistent with the approach to preemption discussed above.

Host State Notification Requirements

Host States may impose any notification or reporting requirement on a branch in the State if the requirement does not discriminate against out-of-State banks and is not preempted by Federal law. Such requirement is in addition to the filing requirement for individual transactions.

State Opt-Out of Interstate Branching

Section 44(a)(2) of the Federal Deposit Insurance Act (as added by section 102(a)) provides that States may opt out of interstate branching by enacting legislation after the date of enactment of the title and before June 1, 1997. If a State opts-out, no bank in any other State may establish a branch in that

State, either through an acquisition or de novo. A bank whose home State opts-out of interstate branching may not participate in any interstate merger transaction.

Interstate Branching De Novo with State Authorization

The appropriate Federal regulator may approve an application by a bank to establish and operate a de novo branch in a State in which the bank does not maintain a branch if a State opts-in to de novo branching, and expressly permits de novo branching. The establishment of the initial branch in a host State which permits de novo interstate branching is subject to the same requirements which apply to the initial acquisition of a bank in the host State, other than the deposit concentration limits. Those limits are inapplicable to de novo entry since, by definition, the bank would not control any deposits in the host State at the time of entry.

Once a bank has established a branch in a host State by de novo branching such bank may establish and acquire additional branches at any location in the host State in the same manner as a bank could have established or acquired under applicable Federal or State law.

Exclusive Means of Interstate Branching

The Conferees adopted provisions to assure that the comprehensive framework for interstate branching established by Title I will, when the provisions take effect, be the exclusive means for national and State banks to enter new States with interstate branches.

Paragraphs (2) and (3) of section 102(b) amend the National Bank Act and the Federal Deposit Insurance Act, respectively, to state that when the interstate merger and

branching provisions take effect, initial interstate entry into a host State may, with exceptions for certain emergency situations, occur only in accordance with this legislation. These provisions will assure that the conditions and safeguards which accompany initial interstate branching will apply to the establishment of interstate branching networks at the time those provisions take effect.

The Comptroller of the Currency (OCC) has used the 30-mile relocation provision of the National Bank Act (section 2 of the Act of May 1, 1886, 12 U.S.C. 30), to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices. Section 102(b)(2) amends the provision so that after June 1, 1997, a national bank relocating its main office to another State may maintain its branches in the first State only if those branches could have been established by a bank with its home State in the new State. However, along with the OCC's approval for the relocation, the bank would be required to obtain the Comptroller's approval under section 5155 of the Revised Statutes to continue to operate any remaining branch offices located in State other than the State of its new main office. Thus, the bank would be required to file a consolidated application with the OCC covering both aspects of the transaction; the OCC would be authorized to act on the remaining out-of-State branch aspect of the transaction only pursuant to section 5155. State banks are treated in a similar manner.

The Conferees are aware of the OCC procedures in permitting relocation across State lines. The Conferees concur with those procedures, including the application of appropriate State law and authority. The Conferees expect the OCC to

continue to follow those procedures until the provisions of Title I become fully applicable on June 1, 1997.

Banks that have moved their main offices pursuant to 12 U.S.C. 30 should not be treated differently than other banks with their main offices in that State. Specifically, for purposes of section 3(d) of the Bank Holding Company [Act], and sections 5(d)(3) and 18(c) of the Federal Deposit Insurance Act, such banks shall be able to make acquisitions and establish branches in the State to which their main office is relocated to the same extent as any other bank with its main office in that State.

AMENDMENT TO THE HOME OWNERS LOAN ACT

The amendment made to the Home Owners Loan Act by section 102(b)(5) of the bill overturns an interpretation of that Act in *First Gibraltar Bank* v. *Morales*, (5th Cir., Dkt. 93-8170, decided April 29, 1994). In the case the United States Court of Appeals for the Fifth Circuit held that the Office of Thrift Supervision had the authority to issue a regulation preempting a provision in the Texas Constitution protecting homesteads of consumers in the State.

This amendment clarifies that neither the Home Owners Loan Act nor any other provision of law provides the Director of the Office of Thrift Supervision with the authority, through regulation or otherwise, to preempt Texas law in the area of homestead protection. By extension, housing creditors under the Alternative Mortgage Transaction Parity Act who were impacted by the decision in the *First Gibraltar* case also continue to be subject to Texas law in the area of homestead protection.

PROVISIONS RELATING TO DIRECT BRANCHES

OF FOREIGN BANKS

Establishment of Direct Branches of a Foreign Bank Outside the Foreign Bank's Home State

Under the House bill, section 5(a) of the International Banking Act of 1978 (IBA) was amended to permit a foreign bank to establish and operate State-licensed branches, either de novo or by acquisition and merger, in any State outside its home State to the same extent that a bank chartered by the foreign bank's home State may establish such branches de novo or by acquisition and merger, respectively. A parallel provision allowed a foreign bank to establish and operate Federally-licensed branches in any State outside its home State to the same exten[t] that a national bank from the foreign bank's home State may do so. In addition, the House bill restates the provision of current law that allows a State to permit foreign banks to establish agencies or limited branches that accept only such deposits as are permissible for a corporation organized under section 25A of the Federal Reserve Act to accept.

The Senate bill did not amend the IBA. As a result, the Senate bill permitted foreign banks to engage in interstate branching only if they first established or acquired a bank in the United States and then followed the same procedures applicable to U.S. banks. The Senate adopted its approach to address its concern that the wholesale direct branches of foreign banks enjoy competitive advantages over U.S. banks because such branches are not subject to the Community Reinvestment Act or to deposit insurance coverage and assessments.

The Conferees agreed to adopt the House structure regarding foreign banks. However, in order to address concerns regarding a level playing field between wholesale direct branches of foreign banks and domestic banks, the Conferees added

provisions regarding: (a) continued application of CRA requirements to a direct branch resulting from an initial interstate entry by acquisition of a regulated financial institution[;] (b) revision of the regulations governing the types of deposits that may be accepted by uninsured direct branches of a foreign bank; (c) types of activities at offshore shell branches managed and controlled by U.S. branches and agencies of foreign banks; and (d) application of consumer protection laws to direct branches of foreign banks. These provisions are among those described below.

Requirement for a separate subsidiary. Section 5(a) of the IBA is amended to provide that the Federal Reserve Board or the Comptroller of the Currency may require a foreign bank to establish a separate U.S. subsidiary bank in order to engage in interstate branching if the Board or the Comptroller finds that it is the only way to verify that a foreign bank adheres to capital requirements that are equivalent to those applicable to a U.S. bank engaged in interstate branching.

Continued application of CRA requirements to a direct branch resulting from an initial interstate entry by acquisition of a regulated financial institution. The Conferees added section 5(a)(8) to the IBA to provide that in cases where a foreign bank acquires a bank or a branch of a bank, in a State in which the foreign bank does not maintain a branch, and such acquired bank was, or was part of, immediately prior to the acquisition, a regulated financial institution as defined in the Community Reinvestment Act (CRA), the CRA shall continue to apply to each branch of the foreign bank which results from the acquisition as if such branch were a regulated financial institution. The Conferees note that the requirements of section 6(c) of the IBA will still apply. The requirements of section

5(a)(8) would not apply in the case of a branch that results from such acquisition that accepts only such deposits as are permissible for a corporation organized under section 25A of the Federal Reserve Act to accept.

Continued authority for branches, agencies and commercial lending companies established prior to this Act. Section 5(b) of the IBA is amended to include a provision that permits foreign banks that lawfully established and operated interstate branches, agencies or commercial lending company subsidiaries before the date of enactment of this Act to continue to operate such offices or subsidiaries after the enactment of this Act.

Determining home State of foreign bank. Section 5(c) of the IBA is amended to provide that any foreign bank that operates a branch, agency, subsidiary commercial bank or commercial lending company must have a home State.

Clarification of direct branching rules in the case of a foreign bank with a domestic bank subsidiary. Section 5(d) is added to the IBA to clarify that a foreign bank may establish direct branches and agencies on an interstate basis and also own or control a U.S. subsidiary bank, and that a national or State subsidiary bank of a foreign bank may acquire, establish or operate branches outside its home State to the same extent as any other national or State bank, respectively, from the subsidiary bank's home State.

Deposits That May Be Accepted by Uninsured Direct Branches of Foreign Banks

Revision of regulations governing types of deposits that may be accepted by uninsured direct branches of foreign banks. The IBA was amended in 1991 to prohibit a foreign bank from

establishing any new branches which take domestic retail deposits that have balances of less than $100,000 and require deposit insurance. As a result, a foreign bank must establish a U.S. subsidiary bank in order to conduct a domestic retail deposit-taking business. Regulations issued by the Federal Deposit Insurance Corporation (FDIC) and the Comptroller of the Currency under section 6 of the IBA govern the types of deposits that may be accepted by uninsured direct branches of foreign banks. To address concerns that these regulations may permit such branches to engage to some extent in domestic retail deposit-taking activity, in regard to which they are not subject to FDIC insurance coverage and assessments or to the requirements of the Community Reinvestment Act, the Conferees added a requirement that the FDIC and the Comptroller revise their regulations to ensure that foreign banking organizations do not receive an unfair competitive advantage over U.S. banking organizations.

In reviewing their regulations in accordance with this subsection, the agencies must consider whether to permit the acceptance of initial deposits of less than $100,000 only from specified types of customers. As part of this revision, the agencies must reduce -- from five percent of average branch deposits to no more than one percent -- the exemption that allows such branches to accept initial deposits of less than $100,000 from any party on a de minimis basis. In carrying out this revision, the agencies must take into account the importance of maintaining and improving the availability of credit to all sectors of the U.S. economy, including the international trade finance sector of the U.S. economy. The agencies must publish final regulations no later than twelve months after the date of enactment of this Act, and may establish reasonable transition

rules to facilitate any termination of any deposit-taking activities that were previously permissible.

Treatment of FDIC-insured banks chartered in Puerto Rico, Guam, American Samoa, Virgin Islands and U.S. territories. Section 6(d) of the IBA is amended to clarify that banks insured by the FDIC and chartered in any territory of the United States, Puerto Rico, Guam, American Samoa or the Virgin Islands are not included as foreign banks for purposes of the requirement to establish a banking subsidiary to engage in a domestic retail deposit-taking business. This provision clarifies that such insured banks (which are also subject to CRA requirements) are to be treated like any other FDIC-insured bank for purposes of acceptance of retail deposits and are therefore not subject to the provisions of section 6(c).

Types of Activities at Offshore Shell Branches Managed and Controlled by U.S. Agencies and Branches of Foreign Banks

U.S. banking agencies do not regulate or supervise the activities of offshore shell branches of foreign banks, even if such branches are managed and controlled by U.S. agencies and branches of foreign banks. The Conferees wanted to avoid any potential for a foreign bank to use its U.S. branches or agencies to manage types of activities through offshore shell branches that could not be managed by a U.S. bank at its foreign branches or subsidiaries.

To address this concern, the Conferees added section 7(k) to the IBA to provide that a U.S. branch or agency of a foreign bank may not, through an offshore shell branch that it manages or controls, manage types of activities that a U.S. bank is not permitted to manage at a foreign branch or subsidiary. Any regulations promulgated to carry out this section must be

promulgated in accordance with section 13 of the IBA and must be uniform, to the extent practicable.

Other Foreign Bank Provisions

Application of consumer protection laws to direct branches of foreign banks. Section 9(b) of the IBA is amended to affirm that direct branches and agencies of foreign banks and commercial lending company subsidiaries are, by various statutory provisions, subject to the following consumer protection laws: Electronic Funds Transfer Act, Equal Credit Opportunity Act, Expedited Funds Availability Act, Fair Credit Billing Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Home Mortgage Disclosure Act, Real Estate Settlement Procedures Act, Truth in Lending Act, Truth in Leasing Act, and Truth in Savings Act.

Foreign bank examination fees. Sections 7(c) and 10(c) of the International Banking Act state that the Federal Reserve Board shall assess the cost of any examination of a branch, agency or representative office of a foreign bank against the foreign bank. The conference report provides a three-year moratorium on any assessments under these sections.

COORDINATION OF EXAMINATION AUTHORITY REGARDING INTERSTATE BRANCHES

Section 105 permits the appropriate State bank supervisor of a host State to examine branches of out-of-State banks to assure compliance with host State laws, including those governing banking, community reinvestment, fair lending, consumer protection and permissible activities, and to assure that the activities of the branch are conducted in a safe and sound manner.

The host State bank supervisor, or other host State law enforcement officer (if authorized under host State law) may take appropriate enforcement actions and proceedings regarding the branch.

State bank supervisors are permitted to enter into cooperative agreements to facilitate supervision of State banks operating interstate. Under the Senate-passed bill, such agreements would have been subject to approval of the appropriate Federal regulator. The House-passed bill had no requirement for approval. The Senate receded to the House on this issue. Both bills contained a provision that nothing in the section affected the authority of Federal banking agencies to examine branches of insured depository institutions, and the Conferees enclosed such a provision in the title.

BRANCH CLOSURES

The House-passed bill added a new section 42(d) to the Federal Deposit Insurance Act, setting forth a procedure for notice, comment, consultation with community leaders and a meeting of representatives of the appropriate Federal banking agency whenever an interstate bank proposes closing a branch in a low- or moderate-income area. The Senate-passed bill contained no comparable provision.

The House provision was amended by the Conferees to specifically include other interested agencies in the required meeting in order to include the National Credit Union Administration in the meetings for the purpose of exploring the development of the use of community development credit unions.

This section does not effect the authority of an interstate bank to close a branch, or the timing of the closing.

FEDERAL RESERVE BOARD STUDY ON BANK FEES

The Federal Reserve is required to conduct an annual survey of the fees charged by banks for retail banking services. Each report shall describe any national or State trends in the cost and availability of such services. Reports are required for seven years.

PROHIBITION AGAINST DEPOSIT PRODUCTION OFFICES

In order to assure that the new interstate branching authorities provided by the Interstate Banking and Branching Efficiency Act of 1994 do not result in the taking of deposits from a community without concern for the credit needs of that community, section 107 requires each appropriate Federal banking agency to promulgate regulations effective June 1, 1997, prohibiting interstate branches from being used as deposit production offices. The regulations are to include guidelines to ensure that each interstate branch is reasonably helping to meet the credit needs of the community in which the branch operates.

The Conferees do not intend that section 109 creates any additional regulatory or paperwork burdens for any institution.

The regulations must require that if the percentage of loans made by an out-of-State bank in the host State relative to the deposits taken by the out-of-State bank in the host State is less than half the average of such percentage for all host-State banks, the appropriate Federal banking agency shall review the loan portfolio of the bank and determine whether the out-of-State bank is reasonably helping to meet the credit needs of the community served by the bank in the host State. If the agency determines that it is not, it may order the branch to be closed and the bank which established the branch may not open to a new branch in that State, unless the bank provides reasonable

assurances to the agency that the bank has an acceptable plan that will reasonably help to meet the credit needs of the communities served by the bank in the host State.

In making such a determination, the appropriate Federal banking agency shall consider a number of factors including whether the branch was acquired as part of the purchase of a failed or failing depository institution; whether the branch was acquired under circumstances where there was a low loan-to-deposit ratio; whether the branch has a higher concentration of commercial and credit card lending; and the ratings received by the out-of-State bank in CRA evaluations.

This provision applies to new interstate branches of national banks, State banks, and foreign banks established pursuant to this title or any amendment thereto.

COMMUNITY REINVESTMENT ACT EVALUATION OF BANKS WITH INTERSTATE BRANCHES

For each insured institution that maintains branches in two or more States, the appropriate Federal banking agency must prepare a written evaluation (pursuant to sections 807(a), (b), and (c) of the Community Reinvestment Act) of the institution's overall CRA performance, along with separate written evaluations and ratings of the institution's CRA performance in each State in which it maintains branches. If an institution has branches in two States in a single multi-State metropolitan area, the agency will prepare a separate written evaluation of the institution's CRA performance within that metropolitan area, and adjust the State-by-State evaluations of the institution accordingly.

Each State-by-State evaluation is to present information separately for each metropolitan area (within that State) in which

the institution maintains one or more branches, and separately for the nonmetropolitan area of the State if the institution has at least one branch in such nonmetropolitan area.

RESTATEMENT OF EXISTING LAW

State Taxation Authority

Section 111(1) restates as part of Title I the provisions of section 7(b) of the Bank Holding Company Act of 1956, regarding State taxation authority. Section 111(2) states that nothing in the title shall be construed as affecting the existing authority of any State or political subdivision of any State to impose and maintain a non-discriminatory franchise or other non-property tax on any bank, branch or bank holding company.

Applicability of Section 5197 of the Revised Statutes and Section 27 of the FDI Act

Section 111(3) specifically states that nothing in Title I affects sections 5179 of the Revised Statutes or section 27 of the Federal Deposit Insurance Act. Accordingly, the amendments made by the Interstate Banking and Branching Efficiency Act of 1994 that authorize insured depository institutions to branch interstate do not affect existing authorities with respect to any charges under section 5197 of the Revised Statutes or section 27 of the Federal Deposit Insurance Act imposed by national or State banks for loans or other extensions of credit made to borrowers outside the State where the bank or branch making the loan or other extension of credit is located.

GAO REPORT ON DATA COLLECTION

The Conferees adopted a Senate provision requiring a General Accounting Office report no later than nine months after

enactment on existing requirements for insured depository institutions to collect and report deposit and lending data and determine what modifications are needed so that interstate branching results in no material loss of information important to regulatory or congressional oversight of insured depository institutions. The House-passed bill had no similar provision.

PREEMPTION OF ARKANSAS USURY CEILING AS IT APPLIES TO CERTAIN LOANS

The Conferees adopted a Senate-passed provision preempting Arkansas usury limit for Consolidated Farm and Rural Development Act loans, while providing the State with a three-year period in which to reenact its limitation. The House-passed bill had no similar provision.

FOR IMMEDIATE RELEASE:
Thursday, May 1, 1997
CONTACT: Richard Mills 202-224-0894

Prepared Statement of Chairman D'Amato
before Financial Institutions Subcommittee
May 1, 1997

"Mr. Chairman, thank you for allowing me to make these remarks and for holding this important oversight hearing on the Office of the Comptroller of the Currency (OCC) and its supervision of the national banking system.

"Mr. Chairman, while the Subcommittee will probably cover many subjects this morning, I want to emphasize one -- the Comptroller's campaign to aggrandize and centralize regulatory power in his agency. These efforts are undermining the dual banking system, threatening the primacy of state insurance regulation, and usurping the prerogatives of Congress.

"Here is a partial list of initiatives by the OCC to illustrate my concerns:

I. <u>Undermining the Dual Banking System</u>

"By actively recruiting state-chartered banks to convert to national bank charters, the OCC is undermining the dual banking system. I have heard from many colleagues and state bank regulators that the OCC has mounted an unprecedented, aggressive marketing effort to convince state-chartered banks to flip to a national charter. In addition, late last year, the

Comptroller blocked a legislative effort in this Committee to fix a technical problem in the Riegle-Neal Interstate Banking law that places state-chartered banks desiring to branch into other states at a distinct disadvantage to nationally chartered banks. The Comptroller is effectively threatening the continuation of the historic and constructive dual banking system.

II. Allowing Bank Operating Subsidiaries Unlimited Powers

"The Comptroller has adopted regulations to permit national banks to establish subsidiaries with the express intention of engaging in non-banking activities -- activities that are not permissible for a bank. The first application under these new rules is from a bank actively seeking to enter real estate development! Of all things, real estate development. As if we haven't learned anything from the mistaken policies of the S&L regulators in the 1980s. The Comptroller will hear much more about these rules from this Congress, I believe.

"The Comptroller is deliberately consolidating power within his agency by first approving new powers for national banks and then asserting the authority to regulate such activities. Insurance may be the best example of the Comptroller's penchant for seizing jurisdiction without the approval of Congress.

III. Pre-empting State Insurance Regulation

"For example, the OCC has stretched the ability of national banks to see insurance far beyond the "small town" provision in the law. In addition, he has divined that certain insurance products are not "insurance" under the National Bank Act. More recently, the OCC has permitted a Missouri-state-chartered bank to convert to a national bank and grandfather its

interest in two insurance agency subsidiaries. And now the Comptroller has apparently decided that the sale of insurance by national banks should not be subject to traditional state insurance and consumer protection regulation and he is threatening to preempt state insurance regulators.

"Mr. Chairman, Congress' default on its responsibility to modernize the financial system has apparently emboldened Mr. Ludwig to take the reins of reform into his own hands. I regard these attacks on the well-established and historic primacy of state insurance regulators and the dual banking system to be the most extreme examples of the OCC's attempts to seize control of regulatory power at the expense of sound public policy and state and federal legislators and regulators.

"I see an unwholesome and dangerous rivalry developing between bank regulators, the Fed and the OCC. As we have learned from the S&L crisis in the 1980s, good judgment can get clouded when regulators act like cheerleaders for their constituents. Congress created the OCC to regulate the institutions it charters, not to be an advocate or marketer for the charter to institutions outside its jurisdiction or to establish some competitive equilibrium for these institutions.

"Mr. Chairman, normally the regulators are entitled to great deference, especially our financial regulators. And they usually receive it from Congress and the courts. But, in my view, a pattern has been established by the Comptroller of the Currency which makes the presumption of deference inoperative. He has displayed a clear disregard for the limits of his authority, for other state and federal regulators and for the Congress. We

should and will not sit idly by while the Comptroller of the Currency attempts to unilaterally redesign the financial system and alter the state and federal regulatory framework established by Congress over the years.

"Above all, I am deeply troubled and concerned that the Comptroller of the Currency's aggressive actions may, once again, subject federally insured banks to excessive risks and expose the bank insurance funds, and therefore taxpayers, to unnecessary liability. Congress can never forget the lessons of the savings and loan crisis in the late 1980's.

"Mr. Chairman, it is my hope that this Congress will pass a comprehensive financial services bill and the Comptroller's actions can be considered in this context. At the same time, I believe the Comptroller's conduct requires legislation to strengthen the dual banking system and to fortify and codify the principle of 'functional regulation' at both the state and federal level. For this reason, I will introduce the 'Financial Products Regulatory Improvement Act of 1997.' The bill implements a system of a 'functional regulation.' Simply put, under this system, the SEC will regulate securities activities, bank regulators will regulate bank products and activities, and State insurance regulators will regulate insurance activities.

"In addition, I want to assure my colleagues that the Committee is working closely with our colleagues in the House to preserve the dual banking system by achieving enactment of legislation, by June 1, to remove the disincentive for state chartered banks to branch interstate. June 1 is the trigger date

for nationwide-interstate banking. This bill is moving through the House and we will act immediately upon its arrival."

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NATIONAL BANK AND TRUST COMPANY OF TRAVERSE CITY, a national banking association	)	
Plaintiff,	)	
v.	)	Civil Action No. 4038
THE EMPIRE NATIONAL BANK, a national banking association, and JAMES J. SAXON, Comptroller of the Currency of the United States,	)	
Defendants.	)	

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION

DISTRICT OF COLUMBIA, SS:

JAMES J. SAXON, being duly sworn, deposes and says:

1. I am the Comptroller of the Currency, duly appointed, qualified, and acting as said officer.

2. I have access to and control over all of the records of the Office of the Comptroller of the Currency.

3. The records of this Office relating to the Haddonfield National Bank, Haddonfield, New Jersey, disclose that said bank's application, dated January 13, 1960, to change the location of its main office from Haddonfield, New Jersey to Delaware Township, Camden County, New Jersey, and to retain as a branch its Haddonfield office, was reviewed by this Office. During that review, it was noted that the Camden Trust Company, a state-chartered bank, operated and maintained a branch office within the municipality of Haddonfield. It was concluded at that time that, although the change in location of the applicant bank's main office was permissible under 12 U.S.C. 30, it was questionable whether the applicant bank's Haddonfield office could be legally retained as a branch. The application was denied by this Office because, under the applicable branching law, the existence of a branch of the Camden Trust Company in Haddonfield precluded the establishment of a branch in that municipality by a bank the main office of which was located outside that municipality.

Subsequently, eight of Haddonfield National's nine directors, later joined by the ninth, as individuals, signed and filed an application for the incorporation of a new National Bank to be located in Delaware Township. Camden Trust Company filed objections to the application and by appearance before the Comptroller, voiced its protest. The Comptroller indicated his intention to approve the application for a new bank, whereupon Camden Trust Company filed an action challenging the Comptroller's authority to issue a certificate which would permit the establishment of the new bank in Delaware Township. The United States District Court for the District of Columbia granted summary judgment to the Comptroller and dismissed the complaint. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court. The opinion of the Court of Appeals is reported at Camden Trust Company v. Gidney, 301 F. 2d 521 (D.C. Cir. 1962), cert. den. 369 U.S. 886 (1962).

4. The application of The Empire National Bank to change the location of its main office form the village of Empire,

Leelanau County, to Traverse City, Grand Traverse County, Michigan and to retain its Empire office as a branch was received by this Office on February 16, 1961. In reviewing this application, it was noted by this Office that no other bank or banking office was established in the village of Empire. It was concluded at that time that the change in the location of the applicant's main office was permissible under 12 U.S.C. 30 and that the establishment and operation of a branch in the village of Empire was permissible under 12 U.S.C. 36c inasmuch as there was no other bank or banking office established and operating in the village of Empire.

5. Decisions on both of the foregoing applications were made by the then Comptroller of the Currency, Ray M. Gidney. Both applications involved a change in the location of a main office and the retention of the former main office as a branch. There was absolutely no question that the change of location of the main office was permissible under 12 U.S.C. 30 in both cases. In the Haddonfield case, it was decided by this Office that the retention of the Haddonfield office as a branch was not legally permissible because of the existence of a branch office of the

Camden Trust Company in the municipality of Haddonfield. In the Empire National case, it was decided by this Office that the retention of the Empire office as a branch was permissible since there was no other banking office established and operating in Leelanau County. I am satisfied that these administrative decisions were correct under the circumstances, and I state, unequivocally, that the decisions in these two cases would be the same if applications involving the same circumstances were presented to me.

James J. Saxon
Comptroller of the Currency

Subscribed and sworn to
before me this ____ day of
February, 1964.

_____

Notary Public